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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS,	)	File No. BPH-870831MI
A LIBERTY PARTNERSHIP	)	
	)	
Et. Al.	)	
	)	
For Construction Permit for		
New FM Channel 243A		
Biltmore Forest, North Carolina		

To: The Commission

REPLY TO  
OPPOSITION TO AMENDMENT

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its reply to the Opposition to Amendment, filed by Orion Communications Limited ("Orion") on November 22, 1999 in the above referenced proceeding. In support whereof the following is shown:

1. Orion opposes the acceptance of the Amendment to Liberty's above referenced application, which was filed on November 10, 1999. Orion argues that the Amendment may not be accepted for two reasons: (a) because, it contends, Liberty did not have reasonable assurance of the availability of its proposed transmitter site in 1987 and (b) because, it contends, the amendment "attempts to bring in...a substantial investor." Neither argument is valid nor is either relevant to the acceptance of the pending Amendment.

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2. Orion's first argument is similar to that advanced by Willsyr Communications in its Opposition to Amendment, filed November 22, 1999. Like Willsyr, Orion essentially contends that, despite the fact that the Amendment was submitted as of right and despite the fact that site availability is no longer a relevant issue, Liberty should be required to show good cause for the acceptance of the amendment.

3. Pursuant to 47 CFR 73.3522(a), as amended, an applicant subject to competitive bidding may submit a minor amendment as of right: (a) in response to a deficiency letter issued by the Commission, (b) pursuant to Section 1.65 or (c) to make a minor change in its proposal. Public Notice DA 99-2153, released October 12, 1999, announced the close of Auction 25 and directed winning bidders to submit minor amendments to their pending long form applications on or before November 12, 1999. See: First Report and Order (FCC 98-194), 13 FCC Rcd. 15920 (1998) ("First Report and Order") at paragraph 98; 47 CFR 73.3576(f)(5)(i). Liberty's Amendment complies with these provisions and was submitted as of right. As such, no showing of good cause is required.

4. Orion's notion that Liberty must demonstrate good cause for the acceptance of its amendment is premised upon the former requirements of 47 CFR 73.3522, which required such a showing for certain pre- and post- designation amendments. The First Report and Order substantially amended 47 CFR 73.3522, and in so doing eliminated the good cause requirement. In fact, even where the

Review Board had rejected a site change amendment, as unsupported by good cause, and dismissed the application for want of a transmitter site, the Commission held that the applicant was fully qualified to participate in the auction and by implication to submit an amendment to an available site, if it were the successful bidder. See: Rio Grande Broadcasting, (FCC 99-111), released May 25, 1999, at para. 14.

5. In addition, Orion's first argument is based upon a faulty premise: that Liberty lacked reasonable assurance of the availability of its initial site in 1987. Orion's contention is not premised upon any record evidence, but rather upon the Initial Decision ("ID") of the ALJ, Walter C. Miller, <sup>1</sup>\_\_\_/ which dealt with the voluminous evidence in the most cursory fashion and which Liberty has shown to have been based upon erroneous findings and conclusions. See: Liberty's Exceptions to Initial Decision, filed June 4, 1990, pp. 3-28. In that regard the ALJ improperly and illegally pre-judged the issues at the time he added them. See: 89M-1080, released April 5, 1989 (copy attached

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1. Orion evidences ignorance of the record and even miscites the ID. Thus, Orion asserts (at page 2) that Liberty's general partner "blatantly dissembled" in her "testimony" at hearing. This is untrue and the ALJ did not so find. The ALJ made no credibility findings with respect to the testimony of Liberty's general partner at hearing. Instead, his claim that she "blatantly dissembled" had reference to her certification in 1987 to the availability of Liberty's proposed site. ID at 2879. This characterization of her actions is entirely unsupported by the record. Even if there was not meeting of the minds, both Ms. Klemmer nor Mr. Warner believed after leaving the meeting with Ms. Utter that they had obtained sufficient agreement with her to meet the Commission's reasonable assurance standard. See: Liberty's Proposed Findings, filed October 23, 1989, at paras. 65-67, 76, 102-103, 106-108.

to Willsyr's Opposition to Amendment). 2/ Thereafter, he steadfastly ignored substantial evidence which was contrary to his predetermined findings and conclusions. See: Liberty's Proposed Findings, filed October 23, 1989, pp31-86, 164-181; Reply Findings, filed November 2, 1989, pp. 2-23; Exceptions at pp. 3-28. He engaged in ex parte communications with the site owner (Tr. 650, 1067-68) and repeatedly attempted to interfere with the direct examination of Liberty's witness, Tim Warner. See e.g.: Tr. 887-88, 920. Ultimately, he completely ignored Warner's testimony in his Initial Decision, because it reflected a significantly better recollection of the relevant events than the site owner's and fully corroborated the testimony of Liberty's general partner. Thus, instead of basing his findings and conclusions upon the record, as he was obligated to do, the ALJ based them upon his own imaginings about what "appeared" to have happened. ID at 50.

6. In contrast to the ALJ, the Mass Media Bureau determined on the same facts that Liberty had shown good cause for the acceptance of its 1989 site change amendment, obviating any

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2. Five days after he added qualifying issues against Liberty and prior to any discovery, much less any hearing thereon, the ALJ announced his findings and conclusions on those issues: Liberty "made a half-hearted but unsuccessful effort to obtain some of Ms. Vicky Utter's land...to use as a transmitter site"; "the record is clear that there was not any meeting of the minds"; Liberty "never made any effort to obtain Ms. Utter's authorization"; and "having failed to obtain reasonable assurance from Ms. Utter in the first instance...Liberty cannot argue that it didn't foresee the need to specify a new site."

possibility that the Bureau believed Liberty lacked reasonable assurance of the availability of its original site. See Consolidated Comments, filed March 29, 1999 (attached, hereto). Thus, the only party to the proceeding with no axe to grind concluded that Liberty did in fact have reasonable assurance, as the Commission defines that term, at the time it filed its application.

7. With regard to Orion's second argument, it is unclear upon what basis it opposes the acceptance of a required amendment on the theory that it "brings in" a "substantial investor", especially in light of the fact that the only such "investor" identified is a creditor. Orion has failed to offer any evidence that Liberty has modified its ownership structure in any manner. Indeed, Orion does not even explain how it believes Liberty's ownership structure has been modified. Instead, it focuses on Liberty's Loan Agreement.

8. Orion complains that while asserting that the interests of Cumulus are nonattributable to it, Liberty has refused to provide a copy of the Loan Agreement. However, Liberty does not base its contention that Cumulus' interests are nonattributable on any provision of the Loan Agreement, but rather on the fact that there existed no such agreement or understanding, as of August 20, 1999. Given this fact, Orion has failed to show how the contents of the Loan Agreement are relevant.

9. Liberty disclosed in an amendment to its short form application, as well as in the pending Amendment, the existence

of the Loan Agreement, the identify of the lender and the fact that the proceeds of the loan would exceed 33% of Liberty's total net asset value. Liberty also asserted that Cumulus' media interests were not attributable, because no agreement or understanding existed as of the relevant deadline, August 20, 1999. As Liberty is relying on the fact that no agreement or understanding existed as of August 20, 1999, it is unclear how an agreement executed on September 10, 1999 could be relevant.

10. Liberty is unaware of any provision of the Commission's rules which requires the submission of loan agreements. If the Loan Agreement accorded the lender an option to acquire the station or an ownership interest therein, which it does not, it would be required to be filed and would have been. To the extent that Orion questions whether the Loan Agreement contained such an option prior to amendment, the certifications previously submitted by Liberty in that regard were intended to apply to the Loan Agreement and all amendments thereto. Thus, at no time did the Loan Agreement provide Cumulus with an option.

11. With regard to Orion's argument that Congress intended participation in the Biltmore Forest auction to be limited to pending applicants, the short answer is that it was. Liberty bid, Liberty was the winning bidder, Liberty will receive the grant and Liberty will construct and operate the station. Furthermore, Liberty must retain the station for a period of five years or face a significant penalty. The fact that Liberty had to borrow the funds with which to bid has no bearing on the fact that only

qualified applicants were entitled to bid. Nothing in the Balanced Budget Act or the Commission's orders implementing it preclude an otherwise qualified applicant from borrowing the funds with which it bids.

12. Orion does not explain how it has been prejudiced by the fact that Liberty utilized borrowed funds to bid at auction. Orion was outbid by both BFBFM and Liberty. <sup>3</sup>/ It can prevail only by disqualifying both, which is highly improbable. Had the Commission precluded applicants from bidding with borrowed funds, such a preclusion would simply have operated to assure that the applicant with the most assets would prevail, which in this case would have been Biltmore Forest FM, Inc. Orion would lose in any event. Thus, it benefits only by delay. Yet, delay is an improper basis for filing an opposition.

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3. While challenging Liberty's use of borrowed funds, Orion has yet to explain where it obtained the \$ 643,500.00 it bid at auction, (assuming it was entitled to the 35% bidding credit it claimed). This issue is especially significant given Orion's prior representations, supported by statements of its principals given under oath, to both the Commission and the Court that: (a) it had no resources with which to "buy a license" or even realistically participate in an auction requiring a \$ 130,000.00 minimum bid and (b) it was unwilling to enter into any agreement with a third party to obtain resources for that purpose. See: Motion for Stay Pendente Lite, filed on May 5, 1999 at p. 8 and attached Declaration of Betty Lee at paras. 2 & 4; Application for Stay Pending Review, filed June 17, 1999, at p. 5, 10; Reply to Opposition of FCC, filed on July 12, 1999, at page 10. Reply to Opposition of Willsyr Communications, filed July 8, 1999, at p. 5. By contrast Liberty did not seek a stay under false pretenses and has made full disclosure of the source of the funds it bid.

13. Ultimately, Orion's complaint is with the rules and procedures adopted by the Commission in implementing the Balanced Budget Act. However, it failed to timely challenge those rules and procedures. Instead, its pending appeal before the Court is directed solely to the issue of whether the Commission's decision to resolve pending hearing proceedings through competitive bidding was arbitrary and capricious. See: Petitioner's Statement of Issues to Be Raised, filed by Orion in Case No. 98-1424 on September 17, 1998. It failed to challenge any of the specific rule changes to implement competitive bidding. Id.

14. Orion has failed to offer any credible rationale for its opposition to the acceptance of Liberty's amendment. Not only did Liberty have reasonable assurance of the availability of its original transmitter site, but the Amendment would be acceptable, even if it had not. Site availability is no longer a relevant issue and 47 CFR 73.3573, as amended, no longer requires a showing of good cause for acceptance of an amendment. The fact that Liberty obtained a loan to secure funds to bid at auction is entirely consistent with the provisions of the Balanced Budget Act and the Commission's Rules implementing it. Furthermore, because Liberty had no agreement or understanding with Cumulus as of August 20, 1999, Cumulus interests are not attributable to Liberty. While Orion may not agree with the changes in the Commission's Rules occasioned by the Balanced Budget Act, it has failed to timely challenge them. Accordingly, Liberty's Amendment, filed as of right in accordance with the applicable



Rules, should be accepted.

Respectfully Submitted

LIBERTY PRODUCTIONS,  
A LIBERTY PARTNERSHIP

By: 

Timothy K. Brady  
Its Attorney

P.O. Box 71309  
Newnan, GA 30271-1309  
770-252-2620

December 3, 1999

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 88-577
	)	
NATIONAL COMMUNICATIONS INDUSTRIES	)	File No. BPH-870831MF
et al.	)	et al.
	)	
For a Construction Permit for a New	)	
FM Station on Channel 243A,	)	
Biltmore Forest, North Carolina	)	

To: Administrative Law Judge  
Walter C. Miller

MASS MEDIA BUREAU'S CONSOLIDATED COMMENTS ON  
PETITIONS FOR LEAVE TO AMEND

1. On March 20, 1989, Biltmore Forest Broadcasting FM, Inc. (BFBFM) and Liberty Productions (Liberty) each filed a petition for leave to amend its application to specify a new transmitter site. The Mass Media Bureau submits the following comments with respect to each amendment.

2. BFBFM argues that its amendment addresses and resolves a site availability issue pending against it. See Hearing Designation Order, 4 FCC Rcd 706 (1989) (HDO). Also, BFBFM contends that its amendment is timely filed within the period for "perfecting amendments" established by the Prehearing Order, paras. 9 and 10, released February 3, 1989, in this proceeding. BFBFM seeks to change its site because it believes the availability of its originally specified site is in doubt. Although it had obtained an option for that site, the property was subsequently sold. BFBFM has opted to change its site rather than seek to enforce its rights to its originally specified site. BFBFM notes that its new site is about 400 feet away from its original site

and that by adjusting its antenna height and power, its contours are virtually indistinguishable from the originally proposed contours.

3. Based upon an analysis of the proffered amendment by its engineering staff, the Mass Media Bureau has determined that the BFBFM amendment is in compliance with the Commission's technical standards. Moreover, the Bureau submits that BFBFM has met the good cause requirements of Section 73.3522(b)(1) of the Commission's Rules. See Allegria I, Inc., 4 FCC Rcd 587 (1989).


4. Liberty has proposed a new site to meet allegations contained in a Motion to Enlarge filed February 27, 1989, by Orion Communications Limited (Orion). As the Orion motion and Liberty Petition to Amend suggest, Liberty no longer has reasonable assurance that the site it originally specified will be available. Liberty has moved promptly to obtain a new site. Liberty proposes the site already specified by Skyland Broadcasting Company. No issues have been specified as to that site.

5. The Bureau's engineering staff has also analyzed Liberty's proffered amendment and determined that it complies with the Commission's technical standards. In the Bureau's view, Liberty has also satisfied the good cause requirements of Section 73.3522(b)(1) of the Commission's Rules. Moreover, Liberty's amendment is clearly a timely filed "perfecting amendment" such as is contemplated by the Prehearing Order, supra.

6. Accordingly, the Bureau interposes no objection to the acceptance of the BFBFM and Liberty amendments. However, neither BFBFM nor Liberty should be allowed to gain any comparative advantage thereby.

Respectfully submitted,  
Alex D. Felker  
Chief, Mass Media Bureau

  
Charles E. Dziedzic  
Chief, Hearing Branch

  
James W. Shook  
Attorney  
Federal Communications Commission

March 29, 1989

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 3rd  
day of December, 1999, served a copy of the foregoing Reply by  
First Class mail, postage prepaid upon the following:

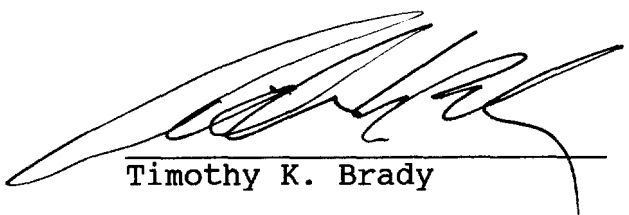
John Riffer, Esq.  
Associate General Counsel  
FCC  
445 12th Street, SW  
Washington, DC 20554

Donald J. Evans, Esq.  
Donelan, Cleary, et. al.  
1100 New York Avenue, N.W. Suite 750  
Washington, D.C. 20005-3934  
(Counsel for Biltmore Forest  
Broadcasting FM, Inc.)

Stephen T. Yelverton, Esq.  
1225 New York Avenue, NW, Suite 1250  
Washington, DC 20005  
(Counsel for Willsyr Communications  
Limited Partnership)

Robert A. DePont, Esq.  
P.O. Box 386  
Annapolis, MD 21404  
(Counsel for Skyland Broadcasting Co.)

Lee J. Peltzman, Esq.  
Shainis and Peltzman  
1901 L Street, NW, Suite 290  
Washington, DC 20036  
(Counsel for Orion Communications Limited)



Timothy K. Brady